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NOTES OF INDIAN CASES.

KARUTHAYYA *v.* KARUTHAYYA, (1954) 1 M.L.J. 675.

This decision illustrates the operation of Article 142 of the Limitation Act in practice. The Article prescribes a period of limitation of 12 years for a suit for possession of immovable property, when the plaintiff while in possession has been dispossessed or has discontinued the possession. Article 144 provides the same period of limitation for a suit for possession of immovable property or any interest therein not otherwise specially provided for. The scope of these two Articles has now become fairly clear, it being held that Article 144 is only a residuary Article which can be invoked only in the absence of any other provision for the case, *Mahammad Amanulla Khan* v. *Badan Singh*[1]. In regard to recovery of possession, it is well settled that " it would be contrary to all legal principles to permit the squatter to put the owner of the fundamental right to a negative proof upon the point of possession," *Secretary of State for India* v. *Chellikani Rama Rao*[2]. Standing a title in *A*, the alleged adverse possession of *B* must have all the qualities of adequacy, continuity, and exclusiveness which should qualify such adverse possession ; but the onus of establishing these things is upon the adverse possessor, see *Kuthali Moothavar* v. *Kunharankutty*[3]. These principles evidently apply only where the issue is confined merely to a plea of adverse possession in particular circumstances. In *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neoghi*[4], the plaintiffs had proved that they were the proprietors of the land to which they alleged title and from which they claimed to oust the defendants. They had, however, been dispossessed or at any rate their possession had been discontinued some years prior to the suit and the land was in the occupation of the defendant who denied their title. In those circumstances, the Privy Council held that the burden lay on the plaintiffs to prove their possession at some time within twelve years immediately before the suit. The Privy Council said : " In all actions for ejectment where the defendants are admittedly in possession and where, as in this particular case, they had been in possession for a great number of years and under a claim of title, it lies upon the plaintiff to prove his own title. The plaintiff must recover by the strength of his own title, and it is the opinion of their Lordships that, in this case, the onus is thrown upon the plaintiffs to prove their possession prior to the time when they were admittedly dispossessed, and at some time within twelve years before the commencement of the suit....and it does not lie upon the defendant to show that in fact the plaintiffs were so dispossessed." On the strength of this decision and others where similar views had been expressed, in *Official Receiver, East Godavari* v. *Govindarajulu*[5], it was held by a Full Bench that a plaintiff who is suing for possession of property in the occupation of another cannot rest his case on title alone and he must show that he has exercised rights of ownership by being in possession within twelve years of suit. What precisely the word ' possession ' in the context means has not been easy to lay down There is perhaps no legal conception more open to a variety of meanings

1. (1889) I.L.R. 17 Cal. 137 (P.C.).
2. (1916) I.L.R. 31 M.L.J. 324 : 39 Mad. 617 (P.C.).
3. (1921) I.L.R. 44 Mad. 883 (P.C.).
4. (1888) I.L.R. 16 Cal. 473 (P.C.).
5. I.L.R. (1940) Mad. 953 : (1940) 2 M.L.J. 190 (F.B.).

than possession, *Lyell* v. *Kennedy*[1]. It is a flexible term not necessarily meaning occupation, *Lake* v. *Dean*[2]. In *Mahomed Ali Khan* v. *Khaja Abdul Ghunny*[3] it was said that it should be such acts of ownership as are *natural* under the existing conditions of the land during the critical period between twelve years before the suit and the actual dispossession which forms the cause of action. Possession means possession of that character which the property is capable of, *Lord Advocate* v. *Young*[4]. The kind and nature of possession that would suffice in any particular case will depend largely on the character of the land, the locality and the use to which it can be ordinarily put. *Lord Advocate* v. *Lord Lovat*[5]. In *Ramanathan Chettiar* v. *Lakshmanan Chettiar*[6] it was stated that as a general rule when the plaintiff seeks on the strength of title and dispossession to oust defendants in possession he must prove possession within twelve years before suit, but that the possession to be proved is such possession as the property is capable of or such as has been the normal method of user, and that when each party who claims possession is unable to prove any sort of effective possession and therefore the normal method of possession is not referable to any such act possession must follow title since the defendants are no more able than the plaintiffs to claim effective possession for twelve years before suit. Whether the principle so stated was in any way affected by the later pronouncement of the Full Bench in *Official Receiver, East Godavari* v. *Govindarajulu*[7] was considered in *Avissa* v. *Kunhaikalanthan*[8]. In this last case it was held (*i*) that a plaintiff suing in ejectment on the strength of his title and dispossession should establish not only title but also possession within twelve years prior to suit; (*ii*) that if once the plaintiff establishes that the date of dispossession or discontinuance of possession is within twelve years before the date of the suit as required by Article 142, in order to establish prior possession within the meaning of the first column of the Article, it is permissible having regard to the nature of the property such as vacant site or land or having regard to the absence of evidence of effective possession or conflicting evidence as to possession before the date of dispossession to invoke the aid of the presumption of possession following title; and (*iii*) that the Full Bench decision in *Official Receiver, East Godavari* v. *Govindarajulu*[7] has not in any way altered the law laid down in *Ramanathan Chettiar's case*[6] and that the Full Bench did not purport to deal with the mode or manner of establishing possession but only laid down the requisites to be proved in a suit falling under Article 142. In the instant case, the suit was for declaration of title and for dispossessing the defendant of enjoyment. The suit was in 1946. The evidence showed that from some time prior to 1934 there was no exercise of any act of possession by the plaintiff. Between 1934 and 1936 the defendant had cultivated the land. There was no cultivation between 1936 and 1943 and from the latter date the defendant was again cultivating. It was held that though the defendant could not show continuous enjoyment throughout twelve years, still that fact will not absolve the plaintiffs of their obligation to show that before twelve years before suit acts of enjoyment by them could be proved if the property was capable of enjoyment in any particular manner. It was pointed out that the property was not one which could not be made use of, that it was not such that it could only be left vacant and in fact it had actually been cultivated by the defendants.

SUBBARAYA SETTY, *In re*, (1954) 1 M.L.J. 679.

This decision deals with an interesting point of criminal procedure. After the hearing of the prosecution witnesses and the framing of a charge, the Magistrate who heard the matter went on leave. An application under section 350 of the Criminal Procedure Code was filed before his successor for the resummoning of the prosecution witnesses who had already been examined for the purpose of re-examining them. Before however they could be heard, the original magistrate returned from leave and he refused to resummon the witnesses already summoned by the interim magistrate. The question was whether the magistrate's refusal was

1. (1887) L.R. 18 Q.B.D. 796, 813.
2. (1860) 28 Beav. 607.
3. (1883) I.L.R 9 Cal. 744 (F.B.).
4. (1887) L.R. 12 A.C. 544.
5. (1880) L.R. 5 A.C. 273, 288.
6. (1930) I.L.R. 54 Mad. 622 : 61 M.L.J. 224.
7. I.L.R. (1940) Mad. 953 : (1940) 2 M.L.J. 190 (F.B.).
8. (1948) 1 M.L.J. 194.

justified. Different views have been taken on the matter. In *Jago Singh* v. *Emperor*[1], the Patna High Court held that when on the transfer of a magistrate a criminal case pending before him is taken up by another magistrate and the trial is started *de novo*, the proceedings which had already taken place before the magistrate who had been transferred are wiped out and that magistrate had no jurisdiction on his return to proceed with the trial from the point where he had left it. In *Sardar Khan Sahib* v. *Athanulla*[2], a magistrate who had almost completed the trial of a case was transferred to another station and his successor taking up the case granted a *de novo* trial to the accused. Thereupon the District Magistrate ordered the case to be transferred to the original magistrate who had tried it as he thought it would obviate the necessity for a *de novo* trial. The High Court held that the grant of a *de novo* trial by the successor of the magistrate who originally tried the case had the effect of wiping out the prior proceedings and hence in law even the old magistrate could not proceed with the trial from the point where he had left it. The same view was taken in *Sriranga Chettiar* v. *Subramania Asari*[3]. A contrary view was, however, propounded by Devadoss, J., in *In re Aynan Muthirian*[4]. The learned Judge held that the mere fact of the transfer of a case to a magistrate's file and his having the case for a short period and then adjourning it to a certain date after directing the issue of summons to some of the witnesses who had already been heard by a former magistrate would not entitle the accused to a *de novo* trial so long as the magistrate had not recorded any evidence and it was only when the magistrate had heard or recorded any part of the evidence that it could be said that the transfer of the case from his file would entitle the accused to a *de novo* trial. The difference narrows down to this namely, as to the stage when the previous proceedings are to be deemed to be wiped out, whether on the issue of summons by the successor magistrate to the witnesses already heard or on the hearing or recording of evidence of at least some of the witnesses so summoned. The conflict of opinions was noticed by Bardswell, J., in *Ramalingam Pillai, In re*[5]. In that case a calendar case on the file of the Stationary Sub-Magistrate of Vriddhachalam was heard by one officer and nearly completed when that officer was transferred to Panruti. On the new magistrate taking charge the accused applied for the case to be tried *de novo* and the magistrate directed the issue of summons to the prosecution witnesses. On an application by the complainant, the District Magistrate ordered the transfer of the case to the Sub-Magistrate, Panruti, who had heard most of the evidence before his transfer. It was held dissenting from the view of Devadoss, J., that the succeeding magistrate must be deemed to have taken cognisance of the case by ordering the issue of fresh summons and hence whoever is to hear the case in those circumstances should hear it *de novo* and the fact that there had been no fresh examination of witnesses by the succeeding magistrate makes no difference. Yet another view-point that has emerged is that where after the successor magistrate has issued summons to the witnesses at the request of the accused for a *de novo* trial, but before he records any evidence the case is retransferred to the magistrate who originally tried the case the accused cannot ask for a *de novo* trial before the original magistrate as he cannot be regarded as "another magistrate" as contemplated in section 350 (1), *Isher Singh* v. *Nirmal Kaur*[6]. More or less the same opinion has been expressed in *Durga Prasad* v. *State*[7]. In the instant case, it is pointed out that the object of the provision in section 350 is to enable the new magistrate to hear the witnesses afresh so that he can watch their demeanour and when this has been done by the magistrate on leave there is no reason for his re-examining the witnesses again when he again takes up the case though during his leave his successor had directed issue of summons to the prosecution witnesses. This line of thought will make the succeeding magistrate's order resummoning the witnesses *brutem fulmen*. In view of the importance of the question involved it is desirable that the matter is finally settled by a pronouncement of the Supreme Court.

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1. (1919) 53 I.C. 820.
2. (1924) 47 M.L.J. 926.
3. A.I.R. 1927 Mad. 31.
4. 1928 Cr. Cases (Madras) 24.
5. (1934) 67 M.L.J. 293.
6. (1952) Cr.L.J. 298.
7. I.L.R. (1952) Nag. 376.

SARMA v. SATISH CHANDRA, (1954) 1 M.L.J. 680 (S.C.)

The interesting question whether an order directing the issue of a search warrant is repugnant to the right guaranteed by Article 20 (3) of the Constitution fell to be decided by the Supreme Court in this case. In the American Constitution the right to privacy is made a fundamental right by the Fourth Amendment, which states : "The right of the people to be secure in their person, houses, papers and effect against unreasonable searches and seizures, shall not be violated ; and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized." It will be noticed that the guarantee is against unreasonable searches. The Fifth Amendment among other things declares that "no person shall be compelled in any criminal case to be a witness against himself." The history and scope of these provisions have been examined in a number of decisions. In English law the principle of protection against self-incrimination had a historical origin and was a reaction against the inquisitorial methods adopted and the brutal sentences imposed by the Star Chamber. The principle came to be recognised that the accused should not be put upon oath and no evidence should be taken from him. In course of time the principle developed into its logical extension by way of privilege of witnesses against self-incrimination when called upon to give testimony or produce documents. The Criminal Evidence Act of 1898 had made the accused a competent witness on his own behalf but the other parts of the principle against self-incrimination in regard to the testimony of witnesses and production of documents stood untouched. The principle in the form in which it stood prior to the statute of 1898 was imported into America and became part of the American Common Law and later on incorporated into the Fifth Amendment. The decision in *Entick* v. *Carrington*[1] was regarded in America as a leading exposition in regard to the principle against self-incrimination. In that case the action was really trespass for entering the plaintiff's dwelling house and breaking open his desks and boxes etc., and searching and examining his papers. Lord Camden observed : "There is no process against papers in civil causes. It has been often tried but never prevailed. Nay, where the adversary has by force or fraud got possession of your own proper evidence, there is no way to get it back but by action. In the Criminal law such a proceeding was never heard of.........It is very certain that the law obligeth no man to accuse himself." Lord Camden added : "Upon the whole we are of opinion that the warrant to seize and carry away the party's papers in the case of a seditious libel is illegal and void." It is to be noted that though he referred to the principle of protection against self-incrimination with great force Lord Camden was only pointing out that the legal philosophy underlying protection against self-incrimination and protection against search and seizure was about the same. This is apparent from what Lord Camden said : "It is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust ; and it should seem that search for evidence is disallowed upon the same principle. There too the innocent will be confounded with the guilty." Lord Camden did not go to the length of saying that a seziure on a search warrant is *ipso facto* self-incrimination. The search warrant in that case was held to be unauthorised and illegal and what was said would at best apply only to illegal searches. Lord Camden's judgment was held by the Supreme Court of the United States as affording foundation for the view that protection against self-incrimination and protection against unreasonable search run into each other and hence a seizure in pursuance of a search may fall within the scope of the Fifth Amendment. In *Boyd* v. *United States*[2], the question was whether section 5 of the Act of June 22, 1874, entitled 'An Act to amend the Customs Revenue Laws' authorising a Court in revenue cases, on motion of the Government Attorney, to require the defendant or claimant to produce in Court his private books, invoices or papers or else the allegations of the Government Attorney are to be taken as confessed was constitutional. It was held it was repugnant to the Fourth and Fifth Amendments. Bradley, J., who delivered the leading judg-

1. 19 State Trials 1029. 2. 116 U.S. 616.

ment observed : "For, the 'unreasonable searches and seizures' condemned in the Fouth Amendment are almost always made for the purpose of compelling a man to give evidence against himself which in criminal cases is condemned in the Fifth Amendment, and compelling a man in a criminal case to be a witness against himself which is condemned in the Fifth Amendment, throws light on the question as to what is an unreasonable search and seizure within the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of the terms." What the decision really established was that the obtaining of incriminating evidence by illegal search and seizure is tantamount to the violation of the Fifth Amendment. In *Felix Gould* v. *United States*[1] the Court observed : "the result is the same to one accused of a crime whether he be obliged to supply evidence against himself or whether such evidence be supplied by an illegal search of his premises and seizure of his private papers. In either case he is the unwilling source of the evidence and the Fifth Amendment forbids that he shall be compelled to be a witness against himself in a criminal case." It is clear that the obtaining of incriminating evidence by illegal search is what is repugnant to the Fifth Amendment. In India under the provisions of the Criminal Procedure Code a general questioning of the accused after all the prosecution witnesses have been examined is compulsory but no oath or affirmation shall be administered to an accused person. The only change is that made by section 7 of the Prevention of Corruption Act, 1947, by virtue of which an accused will be a competent witness on his own application in respect of offences under that Act. So far as witnesses are concerned the Evidence Act provides for compellability to answer even incriminating questions but with immunity from arrest or prosecution on the basis of such evidence or any other kind of use thereof in criminal proceedings except prosecution for giving false evidence. In regard to documents the only protection afforded is that enacted in section 130 of the Evidence Act that no witness who is not a party to a suit shall be compelled to produce his title-deeds to any property, *etc.* From the foregoing it is clear that the protection against incrimination is more or less the same as in England under the common law so far as the accused and the production of documents are concerned. As to oral testimony of witnesses it is modified by the introduction of compulsion coupled with immunity from prosecution on the basis of such compelled evidence. Article 20 (3) of the Constitution provides against testimonial compulsion. Every positive volitional act which furnishes evidence will be testimony. The evidence may be oral or by gestures, or by production of documents or things. Also the protection against testimonial compulsion is not merely in respect of compulsion in the Court room but will cover compelled testimony previously obtained from him. The protection will therefore be available to a person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course may lead to a prosecution. It follows that the protection would extend to any compulsory process for production of evidentiary documents which are reasonably likely to support a prosecution against them. In the words of Mr. Justice Day in *Fremont Weeks* v. *United States*[2], the efforts of the Courts and their officials to bring the guilty to punishment praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavour and suffering which have resulted in their embodiment in the fundamental law of the land. The question is whether issue of search warrants for seizure of documents from persons against whom a formal accusation relating to the commission of an offence has been levelled will be unconstitutional as repugnant to the protection afforded by Article 20 (3). Under the English and American laws it is only illegal searches or unreasonable searches that are prohibited but not all searches. There is nothing corresponding to the Fourth Amendment in America in the Indian Constitution, enabling the Court to import the test of unreasonableness or any other criterion for discrimination between illegal and legal searches. Seizure of documents on search is provided for in sections 94 and 96 of the Criminal Procedure Code.

1. 255 U.S. 298.
2. 232 U.S. 383.

Section 94 provides for the issue of a summons or notice for production and in case there is no compliance with it or if the magistrate is satisfied of likelihood of non-compliance a search warrant is to be issued under section 96. In *Satya Kinkar Ray* v. *Nikhil Chandra Jyotish Opadhyaya*[1], the Calcutta High Court has held that section 94 is applicable to an accused person as well. It may also be taken that there is an element of compulsion in regard to the production of the document sought in that manner. Still it is apparent that these provisions are not opposed to Article 20 (3) as entrenching on the protection afforded by it. A notice to produce a document is addressed to the party and if he produces in compliance therewith it may amount to a testimonial act by him within the meaning of Article 20 (3). But a search warrant is addressed to an officer, generally a police officer, and neither the search by him nor the seizure of any article by him will be an act of the occupier of the premises. They are not therefore testimonial acts of the occupier attracting Article 20 (3). In America, in *Hale* v. *Henkel*[2] McKenna, J., observed : "Search implies a quest by an officer of the law ; a seizure contemplates a forcible dispossession of the owner," and added : "The quest of an officer acts upon the things themselves,—may be secret, intrusive, accompanied by force. The service of a subpoena is but the delivery of a paper to a party—is open and above-board. There is no element of trespass or force in it." In the instant case the Supreme Court takes the view that a power of search and seizure in any system of jurisprudence is an overriding power of the State for the protection of social security and that power is necessarily regulated by law and that there is nothing to show that the constitutional guarantee in Article 20 (3) would be defeated by the statutory provision for searches. It holds that the issue of a search warrant is normally the judicial function of the magistrate and when such judicial function is interposed between the individual and the officer's authority for search, no circumvention thereby of the fundamental right is to be assumed.

HEM RAJ *v.* STATE OF AJMERE, (1954) 1 M.L.J. 694 (S.C.)

This is an important pronouncement of the Supreme Court in regard to corroborative testimony in the case of confessions. Concerning the weight to be attached to confessions there have been conflicting statements, sometimes even by the same Judge and that too within a very short interval. The classical example is that afforded by the rulings given by Sir William Scott (Lord Stowell). In *Williams* v. *Williams*[3], the learned Judge observed : "The Court must remember that confession is a species of evidence which, though not inadmissible is regarded with great distrust. There is a canon particularly pointed against them which says *nec partium confessioni fides habeatur*." In less than two years from then he observed in another case[4]: "I need not observe that confession generally ranks high, or I should say, highest in the scale of evidence —*habemus confitenten reum* is demonstration unless indirect motives can be assigned." It has, however, always been the practice to regard confessional statements with caution and to look for corroboration. In *Mata Din* v. *Emperor*[5], the Court found that the confession bore no mark of truth on the face of it and proceeded to lay down : "A true confession by a person who takes part in a murder invariably adds something to the knowledge already possessed by the investigating officer and that is the greatest test of its truth." And in *Abdul Salam* v. *State*[6] it was held that antecedent recoveries cannot in any way be used to corroborate or test the truth or otherwise of a confessional statement. In the instant case it was argued that a confession can only be corroborated by evidence discovered by the police after the confession was made and that any material already in their possession cannot be put in evidence in support of it. Reliance was placed on *Mata Din's case*[5] as lending support to the argument. The Supreme Court rejected the argument and held that *Mata Din's case*[5] only bears on the value of the confession and does not bear on the

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1. A.I.R. 1951 Cal. 101.
2. 201 U.S. 48.
3. 1 Hagg. Cons. 304.
4. 2 Hagg. Cons. 315.
5. A.I.R. 1931 Oudh 166.
6. 1953 Cr.L.J. 1885.

nature and character of the evidence that can be led to corroborate it. The Supreme Court points out that a confession may be made in the course of a trial and the evidence already recorded may well be used to corroborate it; likewise it may be made in the Court of the Committing Magistrate and materials already in possession of the police may well be used for purposes of corroboration. In this view, the opinion held in *Abdul Salam's case*[1] does not seem to be correct. There is no rule that a confession cannot be corroborated by materials already in the possession of the police.

PANACHAND GANDHI *v.* STATE OF BOMBAY, (1954) 1 M.L.J. 718 (S.C.).

COMMISSIONER FOR HINDU RELIGIOUS ENDOWMENTS *v.* SRI LAKSHMINDRA THIRTHA SWAMIAR (1954) 1 M.L.J. 596 (S.C.).

One question common to both cases and falling to be decided *inter alia* was as to what is the line to be drawn between what are matters of religion and what are not. Two Articles of the Constitution deal in particular with religious freedom. Article 25 guarantees to every person, citizens and others, the freedom of conscience and the right freely to profess, practise and propagate religion, subject always to public order, health and morality and subject also to the power of the State to make laws regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice and to the State's power to make laws providing for social reform and social welfare even though they might interfere with religious practices. Every person has thus a fundamental right under the Constitution subject to the limitations set out not merely to hold any religious belief as may be approved by his conscience or judgment but also to exhibit his beliefs and ideas in such overt acts as are enjoined or sanctioned by his religion, as well as to propagate his views for the edification or enlightenment of others. State regulation cannot touch religious practices as such unless they run counter to public health or morality, but it can be made in regard to activities which are in substance of an economic, commercial or political character despite their being associated with religious practices. Article 26 adverts to one particular aspect of religious freedom only. It gives a religious denomination or section of it the guaranteed right to establish and maintain institutions for religious and charitable purposes and to manage in its own way all affairs in matters of religion. It empowers the denomination or section to hold and acquire property and manage the same in accordance with law. In regard, however, to the latter it is emphasised that the right is only to hold and administer according to law, which means that the State can regulate the administration of the trust properties subject always to the principle that the religious denomination itself has been given by Article 26 the right to administer its property in conformity with any law which the State can validly impose. Any law which takes away the right to administer its property from the religious denomination and vests it in another body or authority will be repugnant to Article 26. The question then is what are matters of religion and what are not. The exact connotation of religion is rather baffling. The dictionary meaning is that religion is "action or conduct indicating a belief in, reverence for, and desire to please a divine ruling power; the exercise or practice of rites or observances implying this"[2]. In *Baxter* v. *Langley*[3] Willes, J., observed: "What is religion? Is it not what a man honestly believes in and approves of and thinks it his duty to inculcate in others, whether with regard to this world or the next? A belief in any system of retribution by an overruling power? It must, I think, include the principle of gratitude to an active power who can confer blessings". In Bouvier's Law Dictionary[4], it is pointed out that religion from *re*, back and *ligo*, to bind means "real piety in practice consisting in the performance of all known duties to God and our fellowmen" and "it has been held to include the principle of gratitude to an active power who can confer blessings". When analysed these definitions postulate that religion involves (*i*) the existence of an over-ruling or active power, a divine power, God; (*ii*) the holding of certain beliefs; and (*iii*) the exercise or practice of rites or observances associated with such beliefs. An American view on the matter is to

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1. 1953 Cr.L.J. 1885.
2. Murray's Oxford Dictionary.
3. 38 L.J.M.C. 5.
4. Vol. 2, page 888.

be found in *Davis* v. *Beason*[1] where Fields, J., observed : "The term religion has reference to one's views of his relations to his Creator and to the obligations they impose of reverence for His Being and character and of obedience to His Will. It is often confounded with *cultus* or form of worship of a particular sect, but is distinguishable from the latter". This definition assumes that religion is necessarily theistic and consists merely of beliefs and is distinct from forms of worship. Religion is undoubtedly a matter of faith with individuals or communities but is not necessarily theistic as involving a belief in the existence of God or of any active power or Intelligent First Cause. Buddhism and Jainism are not theistic. Nor will it be correct to regard religion as mere doctrine or belief. It is certainly true that religion has its basis in a system of beliefs or doctrines which are regarded by the votaries as conducive to their spiritual well-being but it is also something more. A religion may not only lay down a code of ethical rules for its followers to accept but also prescribe rituals and cermonies and modes of worship which are regarded as an integral part of the religion. In other words religion is not merely an opinion or belief but it has its outward expression in acts as well. In *Adelaide Company* v. *Commonwealth*[2], Latham, C.J., observed: "It is sometimes suggested in discussions on the subject of freedom of religion that, though the civil government should not interfere with religious opinion, it nevertheless may deal as it pleases with any acts which are done in pursuance of religious belief without infringing the principle of freedom of religion. It appears to me to be difficult to maintain this distinction as relevant to the interpretation of section 116. The section refers in express terms to the exercise of religion, and therefore it is intended to protect from the operation of any Commonwealth laws acts which are done in the exercise of religion. Thus the section goes far beyond protecting liberty of opinion. It also protects acts done in pursuance of religious belief as part of religion". The Indian Constitution contains no definition of religion and in the absence of one the Supreme Court has adopted the view expounded by Latham, C.J., as applying fully to the provision relating to freedom of religion embodied in the Indian Constitution.

SHYAM LAL *v.* STATE OF U.P., (1954) 1 M.L.J. 730 (S.C.).

This decision of the Supreme Court holds that compulsory retirement of a person from service does not amount to dismissal or removal so as to attract Article 311 of the Constitution. Article 310 (1) reiterates the constitutional theory of the tenure of office being during the pleasure of the President, Governor or Rajpramukh as the case may be. Article 311 (1) is a reproduction of the provisions of section 240 (2) of the Government of India Act, 1935. Article 311 (2) provides: "No such person shall be dismissed, removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken against him". In *Satishchandra Anand* v. *The Union of India*[3], following *I.M.Lall's case*[4], it has been held that removal is on the same footing as dismissal. In regard, however, to an order of compulsory retirement there are some features which distinguish it from removal or dismissal. In removal or dismissal the person removed or dismissed is held to be blameworthy or deficient ; there is no such charge or imputation in complusory retirement. It carries no stigma, or imputation of misbehaviour or incapacity. Again removal or dismissal operates as a penalty and involves loss of benefit already earned ; he is ineligible to draw any pension. But an officer who is compulsorily retired will be entitled to the pension, etc., that he has already earned, and there is no diminution of accrued benefit. But compulsory retirement in one sense is like removal or dismissal from service, namely, it deprives the officer of the chance of serving and getting his pay till he reaches the age of retirement and thereafter to get an enhanced pension. The distinction, however, is that the latter is only a loss of prospect of earning more and not a loss of benefit already earned. For these reasons it is not possible to equate compulsory retirement with either removal from service or dismissal for claiming the benefit of the provision in Article 311 (2) of the Constitution.

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1. 133 U.S. 333, 342.
2. 67 C.L.R. 116, 124.
3. (1953) S.C.J. 323 (S.C.).
4. (1948) F.L.J. 23 : (1948) 2 M.L.J. 55 : L.R. 75 I.A. 225 (P.C.).

NOTES OF INDIAN CASES.

ANDHRA BANK, LTD. *v.* NARAYANA RAO, (1954) 2 M.L.J. 38.

Section 227 (2) of the Indian Companies Act provides that in the case of a winding up by or subject to the supervision of the Court, every disposition of property of the company, and every transfer of shares, or alteration in the status of its members, made after the commencement of the winding up shall, unless the Court otherwise orders, be void. The section corresponds to section 153 of the English Companies Act, 1862; section 205, clause (2) of the Companies (Consolidation) Act, 1908 and section 173 of the Companies Act of 1929. The scope of the provision has been examined in a number of decisions in England and India. The *locus classicus* on the matter is the decision of Lord Cairns in In re *Wiltshire Iron Co. ex* parte *Pearson*[1], where he said : " The 153rd section no doubt provides that all dispositions of the property and effects of the company made between the commencement of the winding up (that is, the presentation of the petition) and the order for winding up, shall unless the Court otherwise orders be void. This is a wholesome and necessary provision to prevent during the period which must elapse before a petition can be heard the improper alienation and dissipation of the property of a company in *extremis.* But where a company actually trading which is the interest of everyone to preserve, and ultimately to sell as a going concern, is made the object of a winding up petition which may fail or may succeed, if it were to be supposed that transactions in the ordinary course of current trade, *bona fide* entered into and completed, would be avoided and would not, in the discretion given to the Court be maintained, the result would be that the presentation of a petition, groundless or well-founded, would *ipso facto* paralyse the trade of the company and great injury without any counterbalance of advantage, would be done to those interested in the assets of the company." According to Lord Cairns the discretion given to the Court is one to be exercised for the benefit and in the interests of the company to enable it to obtain necessary funds for carrying on its business during the period between the presentation of the petition for the winding up and the Court's order on it so as to avoid the business being paralyzed. The transaction must be one entered into in the ordinary course of its current trade *bona fide.* A very good illustration of such a " transaction in the ordinary course of current trade *bona fide* entered into and completed" is afforded by the facts in In re *Park Ward & Co. Ltd.*[2]. In that case between the date of the presentation of a petition for the winding up of the company and the date of the order for its compulsory winding up a debenture was issued by the Company in favour of one Rowley to secure to him the repayment of £1,200 advanced to enable the company to pay wages due to the staff. The validity of the issue of the debenture came up for consideration with reference to section 205 (2) of the Companies (Consolidation) Act, 1908. Apropos of it Romer, J., observed : " Had he not done so the wages would not have been paid and the business temporarily at any rate, would have had to be closed down. The £1,200 was accordingly advanced by Mr. Rowley for the purpose of preserving the business as a going concern. The transaction between him and the company was therefore just the sort of transaction which Lord Cairns thought it was the object of the proviso to the section to preserve and which ought to be rendered valid by an order of the Court." It was also argued that the power of the Court under the proviso ought not to be exercised in favour of a person who at the date of the transaction in question had knowledge that a petition for winding up had been presented. In rejecting the contention, Romer, J., observed : " If I were to adopt the view put forward by Mr. Clayton, a company would in very few cases be able to obtain the assistance necessary to enable it to carry on business as a going concern. Lord Cairns evidently regarded the power given to the Court by the section as one given for the benefit and in the interests of the company so as to ensure that a company which is made the subject of a winding up petition may nevertheless obtain money necessary for carrying on its business and so to avoid its business

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1. (1868) L.R. 3 Ch. A. 443 (C.A.). 2. L.R. (1926) 1 Ch. 828.

being paralysed." The exposition of the Court's power under section 227 (2) of the Indian Companies Act has been practically on the same lines. *Tulsidas* v. *Industrial Bank*[1] points out how the words of the section are *prima facie* wide enough to include any sale or payment which a company may make after the presentation of the petition for winding up thereby making the business come to a standstill and how it is for that reason the Court has very properly laid down that, speaking generally, any *bona fide* transaction carried out and completed in the ordinary course of current business will be sanctioned by the Court under the section while at the same time ensuring that the assets shall not be disposed of at the mere pleasure of the company in violation of the fundamental principle of equality amongst creditors. The *raison d'etre* behind the discretion given to the Court under the section is stated in *Official Liquidators, Gorakhpur Electric Supply Co., Ltd.* v. *Siemens (India), Ltd.*[2] to be that where the business of the Company is continued in good faith either because it is hoped it may not be necessary eventually to wind up the company or because in the interests of all concerned it would be better that the company on being wound up should be transferred as a going concern, it will be necessary for the company to enter into various transactions, and that it would be impossible for it to do so if it was not able to make any transfers. The Court recognised that it will not be possible to make a definite rule to meet all circumstances because these may be extremely varied. In *Ramlal* v. *Official Liquidator, Benares Bank*,[3] Braund, J., stated: "Section 227 (2) is a discretionary section by virtue of the words 'unless the Court otherwise orders.' That gives the Court discretion at any time to make an order in a proper case validating a disposition notwithstanding that it is one made after the commencement of the winding up. In dealing with every question as to the way the discretion is to be exercised the Court must have in mind the fundamental principle that the assets of the company shall so far as it is possible and subject to certain well recognised exceptions be distributed *pari passu* between the creditors and, subject as aforesaid, no creditor shall obtain an advantage over any other creditor". The learned Judge remarked that the test for the exercise of the Court's discretion is whether the Court would have sanctioned the transaction on an application in that behalf. It must be in the nature of a salvage or of real necessity or the only means of keeping the company going. In the instant case a company had borrowed money from a bank after a petition for the winding up of the company and the appointment of a provisional liquidator, and created a charge in its favour. It was held by the Court that on the facts found the transaction in question could not be held to be *bona fide* and the charge was therefore not one to be validated.

COMMISSIONER OF INCOME-TAX, BOMBAY *v.* OGALE GLASS WORKS, LTD., (1954) 2 M.L.J. 67: 1954 S.C.J. 522 (S.C.).

This decision examines *inter alia* the precise effect of the acceptance of a negotiable instrument in payment. In *Stedman* v. *Gooch*,[4] a bill had been taken in *discharge* of an amount due in respect of millinery goods supplied and a receipt had been passed for the bill. Lord Kenyon held that if in payment of the debt the creditor is content to take a bill or note payable at a future day he cannot legally commence an action on his original debt unless and until such bill or note becomes payable or default is made in the payment; but that if such bill or note is of no value, as if, for example, drawn on a person who has no effect of the drawer in his hands and who therefore refuses to accept it, in such case he may consider it as waste paper and resort to his original demand and sue the debtor on it. The decision establishes that payment by bill even if stated to be in discharge is not tantamount to satisfaction. The word 'payment' is not a technical word and has been imported into law proceedings from the exchange and not from law treatises; so much so, when one speaks of paying in cash it means in satisfaction whereas when it is by bill it does not import satisfaction unless the bill is ultimately taken up.

1. (1930) I.L.R. 54 Bom. 718.
2. I.L.R. (1940) All. 730.
3. I.L.R. (1942) All. 86, 98.
4. (1793) 1 Esp. 5: 170 E.R. 262.

This aspect is brought out in *Maillard* v. *The Duke of Argyle*[1] where referring to Lord Kenyon's observation in the earlier case, Tindal, C.J., said : "The word payment does not necessarily mean payment in satisfaction and discharge but may be used in a popular sense." Maule, J., added that a bill cannot be said to be paid until it reaches maturity and is duly honoured. The matter came up in *Kemp* v. *Watt*[2] and Baron Parke observed : "Mr. Browne has argued that the word 'discharge' imports no more than that the bill was given for and on account of the debt and therefore was no payment and I think that is the true construction of the plea". Apart from a payment by bill not operating as satisfaction till the bill is honoured another aspect of the matter is brought out in *Robinson* v. *Read*[3], where Parke, J., laid down that unless a bill is taken by choice instead of cash it is not equivalent to payment. In other words, it is only where the creditor elects to take a bill or cheque having it in his power to obtain payment in cash that it could be taken as an agreement by the creditor impliedly that he was accepting the bill as an unconditional and absolute payment. The law is fully reviewed by the Court of Appeal in In re *Romer and Haslam*[4]. In that case Lord Esher, M.R., observed : It is perfectly well-known law acted upon in every form of mercantile business, that the giving of a negotiable security by a debtor to his creditor operates as a conditional payment only, and not as a satisfaction of the debt, unless the parties agree so to treat it." Bowen, L.J., added : "A bill of exchange given for a debt amounts to conditional payment of that debt, and is only conditional payment so long as it is running ; the payment is liable to be defeated when the bill is dishonoured." It was also held that the execution of a formal receipt for the amount carried by the bill of exchange is not sufficient to rebut the presumption of discharge being only conditional. A cheque no doubt is a conditional payment only ; but unless dishonoured is payment. In other words, where it is not in fact dishonoured, it cannot be denied that it constitutes payment. In *Felix Hadley & Co.* v. *Hadley*[5], the defendant had sold to the company his business as existing on 31st December, 1887, with the goodwill, stock-in-trade, and "all book and other debts due to the vendor in connection with the said business and the full benefit of all securities for such debts". On 1st January, 1888, the defendant had in his possession certain cheques and bills given for trade debts which had been received by him prior to that date and were subsequently honoured. On the question whether the trade debts to which the cheques and bills related were to be regarded as paid on or before 31st December, 1877 and as such did not pass to the company, Byrne, J., observed : "In this case, I think what took place amounted to a conditional payment of the debt; the condition being that the cheque or bill should be duly met or honoured at the proper date." The learned Judge held that the cheques and bills having been met they would not be debts outstanding on 31st December, 1887 and did not pass to the company. The matter is also dealt with in *Rokhana Corporation* v. *Inland Revenue Commissioners*[6], where Lord Maugham stated : "Apart from the express terms of section 33, sub-section (1) [of the Finance Act, 1924] a similar conclusion may be founded on the well known common law rules as to the effect of the sending of a cheque in payment of a debt, and in the fact that the payment is subject to the condition subsequent that the cheque must be met on presentation ; the date of payment if the cheque is duly met is the date when the cheque was posted." These are equally the principles of law applied in India, vide *Jambu Chetty* v. *Palaniappa Chetty*,[7] *Palaniappa Chettiar* v. *Arunachellam Chetty*[8]. The instant decision is in line with these authorities and holds that a cheque unless dishonoured is payment, that delivery of the cheque to the post office at the request of the addressee is delivery to him, and that the place of the posting of the cheque is the place where the payment is to be deemed to be made.

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1. (1843) 6 Man & G. 40: 134 E.R. 801.
2. (1846) 15 M. & W. 672: 153 E.R. 1026.
3. (1829) 9 B. & C. 448: 109 E.R. 167.
4. L.R. (1893) 2 Q.B. 286.
5. L.R. (1898) 2 Ch. 680.
6. L.R. (1938) A.C. 380.
7. (1903) I.L.R. 26 Mad. 526.
8. (1911) 21 M.L.J. 432.

SULTAN AHMED ROWTHER *v.* STATE OF MADRAS, (1954) 2 M.L.J. 93.

This case decides an interesting question, namely, the meaning of the words "agricultural or horticultural produce grown on any land in which the assessee had an interest" in section 2 (i) of the Madras General Sales Tax Act, 1939. Under that section the assessee is entitled to exclude from his turn-over the proceeds of the sales of such produce for purposes of assessment. To claim exemption the assessee must have had an interest in land as owner, usufructuary mortgagee, tenant or otherwise. From the collocation, it is clear that the words 'or otherwise' should be interpreted *ejusdem generis*. Other enactments like the General Clauses Act, the Tranfer of Property Act and the Registration Act have defined 'immovable property' for purposes of the Act concerned, and there is a large volume of decisions explaining what will amount to an interest in immovable property. The leading pronouncement is that in *Marshall* v. *Green*[1], where the sale was of growing timber to be taken away as early as possible by the purchaser. It was held that it was not a contract for the sale of land or of any interest therein within the meaning of section 4 of the Statute of Frauds. It was pointed out that at one time the principle was that wherever at the time of the contract it is contemplated that the purchaser should derive the benefit of further growth of the thing sold from further vegetation and from the nutriment afforded by the land the contract was to be deemed as for an interest in land ; but where the process of vegetation is over or where the intention of the parties is an immediate or early removal of the thing sold from the land the contract is to be taken as one for goods. In later days according to the learned Chief Justice Coleridge, C.J., the principle was modified and it became settled law that with regard to corn and other growth of the earth which are produced not spontaneously but by labour and industry, a contract for the sale of them while growing irrespective of whether at that time they were in a state of maturity or have still to derive nutriment from the land to reach that state, is contract for the sale of goods and not of any interest in land. In other words, in regard to *fructus industriales* though they are to derive a benefit from the land after the sale to become fit for delivery nevertheless it will be a sale of goods only. If however they are not *fructus industriales* if the intention was that they are to remain in the land for the advantage of the purchaser and are to derive a benefit from so remaining then the contract will in part relate to an interest in land. In case the thing not being *fructus industriales* is to be delivered immediately, whether the seller is to deliver it or the purchaser is to enter and take it, the buyer is deriving no benefit from the land and the contract is not for an interest in land. In *Kauri Timber Company, Ltd.* v. *Commissioner of Taxes*,[2] a considerable portion of the concerned property had been acquired under leases for a period of 99 years by the company. There was no obligation on the company to cut down and remove the timber or indeed to do so at any special date, the rights in regard to the timber being co-extensive with the period of the leases. On these facts, Lord Shaw delivering the judgment of the Privy Council observed : It appears to the Board that the present case involves no refinement of distinction ; for the transaction under which the timber rights were acquired was not one under which a mere possession of goods by a contract of sale was given to the appellant company but was one under which they obtained an interest in, and possession of land. So long as the timber at the option of the company remained upon the soil, it derived its sustenance and nutriment from it. The additional growth became *ipso jure* the property of the company. All rights of possession necessary for working the business of cutting or even for preserving the standing and growing stock of timber were ceded under the leases. All this together with the business facilities for removal and sale was granted to the company, which became thereby invested with the possession of and an interest in the land". Thus according to English law, (i) a distinction exists between things being *fructus industriales* and things not being *fructus industriales* ; in regard to the former though the thing sold has to remain on the land and derive nutriment from the soil for any period of time it will be a sale

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1. (1875) L.R. 1 C.P.D. 36.

2. L.R. (1913) A.C. 771 (P.C.).

of goods and no interest in land passes; in regard to things not *fructus industriales* it is a question of intention of the parties to be gathered from the facts of the case whether it is a sale of goods and no more. (ii) If the things sold is to be removed immediately or within a short period and entry on the land is only ancillary to that object it will be a sale of goods ; but if there is no obligation to remove immediately or on any set date and the acts of user permitted amount to giving possession of the land the contract will be as for an interest in land. The law of India also seems to be the same. In *Seeni Chettiar* v. *Santhanathan Chettiar*[1], the plaintiff had assigned by document to the defendatn for consideration the right "to cut and enjoy the trees, etc.,, in a tank for a period of four years from its date". The question was whether the document conveyed an interest in immovable property within the meaning of the Registration Act. The trees were of spontaneous growth. The right passed was not merely to the trees existing at the date of the transaction but also to those that may grow later. The period during which the right was exercisable was not a short period. In these circumstances it is fairly clear that the arrangement conveyed an interest in land within the meaning of the Registration Act. In *Natesa Gramani* v. *Thangavelu Gramani*[2], the arrangmenet covered a period of two years. The right conferred was to draw toddy from and pick fruits of palmyrah trees on a certain land. Neither the trees nor even the leaves were to be cut. It was held that no interest in immovable property was created for purposes of the Registration Act, the right of entry on the land for climbing the trees being only a license and no more. An instructive decision on the point is that of the Judicial Committee in *Mohanlal Hargovind* v. *Commissioner of Income-tax, C.P. & Berar.*[3] In that case, the appellants were doing business as bidi manufacturers. The bidis were composed of tobacco contained or rolled in leaves of a tree known as tendu leaves. The appellants obtained the leaves by entering into a number of short term contracts with Government and other owners of forest. The contracts allowed the appellants to coppice small tendu plants a few months in advance to obtain good leaves and to pollard the tendu trees a few months in advance to obtain better and bigger leaves. On these facts it was held that the contracts created no interest in the land. Lord Greene observed : "They are simply and solely contracts giving to the grantees the right to pick and carry away leaves, which of course implies the right to appropriate them as their own property. The small right of cultivation given....is merely ancillary and is of no more significance than would be *e.g.*, a right to spray a fruit tree given to a person who has bought the crop of apples. The contracts are short term contracts. The picking of the leaves under them is to start at once or practically at once and to proceed continuously. It is true that the rights under the contracts are exclusive but in such a case as this that is a matter which appears to their Lordships to be of no significance". In the case under notice, the contract was for one year and gave the right to collect the usufruct of the arecanut palms on the concerned land. Applying the tests mentioned *supra* it was held that no interest in land was created by the transaction.

BALASUNDARA MUDALIAR *v.* MUTHUVENKATACHALA MUDALIAR, (1954) 2 M.L.J. 141.

Whether time is of the essence of the contract in the case of a sale and an independent agreement to reconvey within a specified time was the question raised and answered in this case. In equity time is not of the essence of the contract. The object of it is to do justice between the parties. The Court looks at the substance and not at the mere form of the contract for the purpose. The scope of this principle has been elucidated in a number of decisions. In *Roberts* v. *Berry*[4], Turner, L.J., said that "time may be made to be of the essence of the contract by express stipulation between the parties, by the nature of the property or by surrounding circumstances

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1. (1896) 6 M.L.J. 281 : I.L.R. 20 Mad. 58 (F.B.).
2. (1913) I.L.R. 38 Mad. 883.
3. (1949) 2 M.L.J. 571 : L.R. 76 I.A. 235 : I.L.R. (1949) Nag. 892 (P.C.).
4. (1853) 3 De. G. M. & G. 284 : 43 E.R. 112.

showing the intention of the parties that the contract was to be completed within a limited time." Where a contract mentions a particular time for the doing of an act without anything more such intention is not inferred. In the above case, Turner, L.J., remarked: "In order to give legal rights it is necessary that some time should be specified at which the contract is to be completed; but this Court looks at such a stipulation as being merely intended to create legal right and not to determine the substance of the contract or anything beyond the legal right". Developing the thesis, it was stated by Lord Cairns in *Tilley* v. *Thomas*[1]: "A Court of equity will indeed relieve against, and enforce specific performance, notwithstanding failure to keep the dates assigned by the contract either for completion or for the steps towards completion, if it can do justice between the parties and if there is nothing in the express stipulations between the parties, the nature of the property, or the surrounding circumstances which would make it inequitable to interfere with and modify the legal right. That is what is meant and all that is meant when it is said that in equity time is not of the essence of the contract." That these principles are applied in India also is clear. Section 55 of the Contract Act provides that where a party to a contract promises to do a certain thing at or before a specified time and fails to do any such thing at or before the specified time, the contract or so much of it as has not been performed, becomes voidable at the option of the promisor, if the intention of the parties was that time should be of the essence of the contract. In *Jamshed Khodaram* v. *Burjorji Dhunjibhai*[2], Viscount Haldane after adverting to the principles of English law and the provision in section 55 of the Contract Act observed : "Their Lordships do not think that this section lays down any principle which differs from those which obtain under the law of England as regards contracts to sell land." After pointing out that the principle is well expressed in Lord Redesdale's judgment in *Lennon* v. *Napper*[3], and adopted by Knight Bruce, L.J., in *Roberts* v. *Berry*[4] and is again formulated by Lord Cairns in *Tilley* v. *Thomas*[1] and by the House of Lords in *Stickney* v. *Keeble*[5], Viscount Haldane said : "Their Lordships are of opinion that this is the doctrine which the section of the Indian statute adopts and embodies in references to sales of land." He went on to add : "The special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to the contract are to be taken as having really and in substance intended as regards the time of its performance may be excluded by any plainly expressed stipulation. But to have this effect the language of the stipulation must show that the intention was to make the rights of the parties depend on the observance of the time limits prescribed in a fashion which is unmistakable. The language will have this effect if it plainly excludes the notion that these time limits were merely of secondary importance in the bargain and that to disregard them would be to disregard nothing that lay at its foundation." In regard to the observance of time limits prescribed for the exercise of a privilege or option given to a party the aforesaid considerations will not apply, and the time limits will have to be strictly complied with. In *Barrell* v. *Sabine*[6], it was stated that "where there is a clause or provision in the conveyance for the vendor to repurchase, the time limited for that purpose ought to be precisely observed." In *Joy* v. *Birch*[7], one W.C. by indenture dated in 1800 for the consideration of two sums of £2,000 and £2,000 granted to G.J. two annuities of £300 each charged on certain freehold lands of his. The indenture contained powers of repurchase by W.C., his heirs and assigns at any time after 6th March, 1804, on giving twelve months' notice in writing and paying all arrears. The Lord Chancellor observed : " It is a well established rule, that under a clause of repurchase of this description being for the purpose of determining an interest, the terms of the proviso of repurchase must be strictly complied with ".

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1. L.R. (1868) 3 Ch.A. 61.
2. (1915) 30 M.L.J. 186 : L.R. 43 I.A. 26 : I.L.R. 40 Bom. 289 (P.C.).
3. (1802) 2 Sch. & Lef. 682.
4. (1853) 3 De G.M. & G. 284 : 43 E.R. 112.
5. L.R. (1915) A.C. 386.
6. 1 Ver. 268 : 23 E.R. 462.
7. (1836) 4 Cl. & Fin. 57 : 7 E.R. 22.

In *Dibbins* v. *Dibbins*[1], articles of partnership had provided that on the death of either partner, the survivor should have the option of purchasing the deceased partner's share on giving notice of his intention to do so within three months from the death. The surviving partner was of unsound mind and notice of intention to purchase was given on his behalf by his solicitor within the specified time, though such notice cannot be valid in law. An order was subsequently made under the Lunacy Acts authorising notice of purchase to be given and a second notice was accordingly given. By then however the three months' period had expired. It was held that the first notice being invalid it cannot be ratified by the issue of the second notice; and the second notice having been given beyond the time limit prescribed there was no compliance with the contract. In so deciding Chitty, J., observed: "The doctrine of equity that time is not of the essence of a contract is not one of universal application, and it is settled with reference to options of this kind that there is no difference as to time between the rule of equity and the rule of common law; in other words, in exercising an option of this nature where time is limited the option must be exercised (if at all) within the time for which it is expressed to be given, both at law and in equity". In Coote's Law of Mortgages[2], it is stated that "the right of repurchase is a privilege and is only to be exercised on a strict performance of the terms". In India the matter was considered in *Samarapuri Chettiar* v. *Seetharama Chettiar*[3], where Sadasiva Ayyar, J., held that where the transaction is not a mortgage the right to repurchase being an option must be exercised according to the strict terms of the power. In the instant case, where there was a completed sale and on the same date an agreement to reconvey within a specified time had also been executed, applying the principles set out above it was held that time is of the essence of the contract as otherwise the position of the purchaser would be very difficult as he would not know at what point of time his title to the property has become perfected and not questioned.

VITHLANI *v.* MEGHJI, (1954) 2 M.L.J. 202 : (1954) S.C.J. 626 (S.C.).

The drawee is not as such ordinarily liable on a negotiable instrument. His liability arises only when he accepts the bill. In *Sheth Kahandas Narandas* v. *Dahiabhai*[4], West, J., observed that where there has been no acceptance no cause of action can have arisen to the payee against the drawee. Section 32 of the Negotiable Instruments Act enacts that "in the absence of a contract to the contrary, the maker of a promissory note and the acceptor before maturity of a bill of exchange are bound to pay the amount thereof at naturity according to the apparent tenor of the note or acceptance respectively, and the acceptor of a bill of exchange at or after maturity is bound to pay the amount thereof to the holder on demand". This section does not postulate any different principle. Section 61 provides for presentment for acceptance only when the bill is payable after sight and not when it is payable on demand. This does not however mean that in the latter case presentment for acceptance is dispensed with. In the case of a bill payable on demand both the stages synchronise. The presentment is both for acceptance and payment. If payment is made, acceptance is necessarily implied. If no payment is made it signifies non-acceptance. In the case of a bill payable after sight the two stages stand separated. But in either case there can be no liability of the drawee in the absence of acceptance. In the case of a bill payable after sight section 61 provides that the bill should be presented for acceptance by the holder or on his behalf. It is true there is no similar provision in regard to a bill payable at sight. But inasmuch as in the case of such a bill presentment for acceptance and presentment for payment synchronise it follows that under section 78 the person entitled to receive payment is the person entitled to present it for acceptance. Such being the case it would follow that where an unauthorised person presented the bill and got paid there is no valid acceptance and therefore no privity can arise between the drawee and the payee. The instant decision elucidates the position in the above manner.

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1. L.R. (1896) 2 Ch. 348.
2. 9th edition. Vol. I, p. 28.
3. (1919) 37 M.L.J. 109 : I.L.R. 42 Mad. 802.
4. (1879) I.L.R. 3 Bom. 182.

STATE OF MADRAS *v.* BAFFAKI THANGAL, (1954) 2 M.L.J. 236.

In English Law, certain principles have become settled in respect of privilege claimed by officers of Government against production of documents. Privilege does not attach to a document merely because it is a State or official document but only if its disclosure would be contrary to the interests of the public. The privilege is a narrow one most sparingly to be exercised. The principle of the rule is public interest and the rule accordingly will be applied no further than what the attainment of the object requires. The privilege should normally like any other be claimed under the sanction of an oath, the oath being that of a responsible minister of State whose mind has been directed to the question, *Robinson* v. *State of South Australia*[1]. The matter was fully considered by the House of Lords in *Duncan* v. *Cammell, Laird & Company, Ltd.*[2], and it was pointed out that the decision to object should be taken by the minister who is the political head of the department concerned and that he should have seen and considered the contents of the documents and himself formed the view that on grounds of public interest they ought not to be produced. It was also emphasised that the mere fact that the minister or the department does not wish the document to be produced is no adequate justification, and that production should only be withheld when the public interest would otherwise be damnified, as where disclosure would be injurious to national defence, or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service. It was further laid down that in such a case the Court should not require to see the document for the purpose of ascertaining whether disclosure would be injurious to public interest or not and that ministerial objection taken in the proper form is conclusive. In India, however, the matter is governed by specific statutory provision. Section 123 of the Evidence Act states that " no one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit ". The language of the section would seem to allow the claim of privilege whatever may be the nature of the evidence provided it is derived from unpublished official records. That the privilege can be sustained only if the evidence if given will be against public interest does not follow from the language. The analogies of the English law may not therefore be relevant. Another point of some difficulty is as to what is meant by the words "officer at the helad of the department concerned ". Even in England the practice seems to be to place the permanent head of the department on the same footing as the minister for this purpose. Taylor states[3] : " The objection that a document is protected from production as being a State document cannot however be given effect to unless it be taken by the proper officer of the Government himself, that is, a minister or head of the department ". In *I. M. Lall* v. *Secretary of State*[4], Abdul Rashid, J., has pointed out that the principle and foundation on which section 123 rests is concern for the public interest and that, if an affidavit is made by the head of the department that he does not wish to produce certain documents as they constitute unpublished official records relating to affairs of State, he is deposing by implication that the document will be prejudicial to the public interest. The learned Judge also held that affidavits from a Secretary to Government in the Department or from the Chief Secretary will suffice. The decision in *Din Bai* v. *Dominion of India*[5] also seems to assume this position. In the instant case, the same view of section 123 has been taken and it is held that affidavits by permanent heads of departments like Secretaries to government claiming privilege on the ground that the documents related to affairs of State is sufficient compliance with section 123 and that it is not correct to say that the Secretary is not an officer at the head of a department within the meaning of the section.

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1. L.R. (1931) A.C. 704 (P.C.).
2. L.R. (1942) A.C. 624.
3. Taylor on Evidence, 12th edition, Vol. I.
4. A.I.R. 1944 Lah. 209.
5. A.I.R. 1951 Bom. 72.